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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CLINTON H. MITCHELL and  
CLINTON MITCHELL FOUNDATION,

Appellants

v.

R. A. RIDDELL, District  
Director of Internal Revenue,

and

UNITED STATES OF AMERICA,

Appellees

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ON APPEAL FROM  
THE ORDERS OF THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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BRIEF FOR THE APPELLEES

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MITCHELL ROGOVIN,  
Assistant Attorney General.

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BRIEF FOR THE APPELLEES

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OPINION BELOW

The District Court's order denying the appellants' motion for summary judgment (I-R. 56-57) 1/ and its order granting the Government's motion to dismiss (I-R. 58-62) are not officially reported.

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1/ "I-R. " and "II-R. " references are to Vols. 1 and 2 of the record on appeal.



## JURISDICTION

This appeal relates to federal income taxes in that the appellants seek to secure a declaratory judgment decreeing that the Clinton Mitchell Foundation qualifies as a tax-exempt organization. On October 5, 1967, the District Court entered an order denying appellants' motion for summary judgment and an order granting the Government's motion to dismiss the action. Within sixty days thereafter, on October 25, 1967, appellants filed their notice of appeal. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

## QUESTION PRESENTED

Whether under the circumstances of this case the appellants are entitled to a declaratory judgment under Section 2201 of 28 U.S.C. determining that the Clinton Mitchell Foundation qualifies as a tax-exempt organization for federal tax.

## STATUTES INVOLVED

28 U.S.C. :

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Internal Revenue Code of 1954:

SEC. 7422 [as amended by Sec. 3(a), Act of November 2, 1966, P. L. 89-713, 80 Stat. 1107]. CIVIL ACTIONS FOR REFUND.



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(f) Limitation on Right of Action for Refund. --

(1) General rule. --A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of title 28 of the United States Code (relating to aliens' privilege to sue).

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(26 U.S.C. 1964 ed., Sec. 7422.)

SEC. 7423. REPAYMENTS TO OFFICERS OR EMPLOYEES.

The Secretary or his delegate, subject to regulations prescribed by the Secretary or his delegate, is authorized to repay--

(1) Collections recovered. --To any officer or employee of the United States the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expense of suit; also

(2) Damages and costs. --All damages and costs recovered against any officer or employee of the United States in any suit brought against him by reason of anything done in the due performance of his official duty under this title.

(26 U.S.C. 1964 ed., Sec. 7423.)

STATEMENT

The appellant Clinton H. Mitchell is the creator and controlling trustee of the Clinton Mitchell Foundation and is empowered to represent such foundation. (I-R. 2, 32, 50-51.)

On April 14, 1967, Clinton H. Mitchell filed a complaint (I-R. 2-5) in the court below setting forth two causes of action.



The first sought to recover the sum of \$10 with interest alleged to have been overpaid by the Clinton Mitchell Foundation. The payment of this sum was made voluntarily (I-R. 60) and it was purportedly tendered "as partial payment on any tax for which you may hold us accountable" (see letter dated May 17, 1966 (I-R. 13)). The payment of \$10 was apparently made in anticipation of possible future assessments of the Internal Revenue Service, and was clearly not made in payment of a then existing liability. (I-R. 52.) By his second cause of action the appellant Mitchell sought to obtain what amounts to a declaratory judgment decreeing that the Clinton Mitchell Foundation qualifies as a tax-exempt organization.

On July 14, 1967, the Government filed a motion to dismiss (I-R. 8-15) Mitchell's complaint on the grounds of (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the defendant, R. A. Riddell, District Director, Internal Revenue Service <sup>2/</sup>; (3) failure to state a claim upon which relief may be granted; and (4) lack of jurisdiction over the plaintiff. Thereupon Clinton H. Mitchell filed a notice of opposition and an opposition to the Government's motion to dismiss (I-R. 16-17, 19-30) and a hearing on the motion took place on August 14, 1967.

At the above referred to hearing it was established that this action seeking a refund of \$10 purportedly paid as federal taxes was in the nature of an action for declaratory judgment which action

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<sup>2/</sup> At the time of the commencement of this action Mr. Riddell had ceased to be District Director of Internal Revenue and had retired from such position and the service of the Government. (I-R. 58.)





is interdicted by 28 U.S.C., Section 2201. (II-R. 3.) Accordingly, the trial court dismissed the action on the condition that the Government refund to Clinton H. Mitchell, the sum of \$10. In this regard the Internal Revenue Service was contacted and instructed to comply with the order. (II-R. 14.)

Following this hearing and as a result thereof, the court below on August 25, 1967, approved a stipulation between the parties that the Clinton Mitchell Foundation may be joined with Clinton H. Mitchell as plaintiff. This joinder took place on a showing that Clinton H. Mitchell was the real party in interest. (I-R. 32.)

In the meantime and before the \$10 could be refunded to him, Clinton H. Mitchell and the Clinton Mitchell Foundation filed on September 13, 1967, a document entitled "Plaintiff's Motion for Summary Judgment and Mandate" (I-R. 33-36) wherein they prayed the court to "approve this motion: that his charitable foundation be held tax exempt for herein period, and that such condition continue to apply during such time as he remain in compliance with pertinent and applicable codes and laws" (I-R. 35-36). To this motion the Government filed an opposition (I-R. 37-40) setting forth among other things that "this action, for the refund of Federal taxes in the amount of \$10.00, is in the nature of an action for declaratory judgment, which action is interdicted by Title 28, U.S.C., §2201" (I-R. 39).

Thereafter, or on September 29, 1967, the parties entered into a stipulation which after reciting that the plaintiffs had brought the instant action for a refund of federal taxes in the amount of



\$10, "which amount is not, and never has been, the subject matter of an assessment against the plaintiffs, either individually or jointly" and that "the defendant has agreed to refund to plaintiff Clinton Mitchell" such sum "receipt of which amount is hereby acknowledged by said plaintiff" then provided: "1. Plaintiff Clinton Mitchell has been refunded the amount of ten and no/100 dollars (\$10.00) referred to above; 2. Plaintiffs and defendant agree that the acceptance of said amount by Clinton H. Mitchell shall not be construed to preclude a later assertion that the Clinton Mitchell Foundation is a tax-exempt organization; 3. Plaintiffs and defendant agree that payment of said amount by defendant shall not be deemed to constitute an admission that the Clinton Mitchell Foundation is a tax-exempt organization." (I-R. 52-53.)

Thereafter, or on October 5, 1967, the court below on the basis of the above facts and proceedings entered an order denying the plaintiffs motion for summary judgment, stating that inasmuch as the plaintiffs are here seeking to secure declaratory relief with respect to taxes which is not permitted by Section 2201 of 28 U. S. C., their motion must be denied. (I-R. 56-57.) On the same day, the court below entered an order granting the Government's motion to dismiss, noting that it had no jurisdiction of the subject matter of the action in view of the payment of the sum of \$10 to Clinton H. Mitchell by the Government. (I-R. 58-62.) Whereupon, the plaintiffs below appealed to this Court. (I-R. 63.)



## SUMMARY OF ARGUMENT

The sole issue remaining in this action is whether appellants are entitled to a declaratory judgment determining that the Clinton Mitchell Foundation qualifies as a tax-exempt organization for federal tax purposes. It is clear that the instant action is "with respect to Federal taxes" and accordingly under the specific terms of Section 2201 of 28 U. S. C. , the courts have no jurisdiction to enter declaratory judgments. Moreover, even if Section 2201 permitted a declaratory judgment in some tax cases, which indisputably it does not since no assessment for income taxes has yet been levied against the Foundation, there is no "actual controversy" between the appellants and the Government in the instant case as is required for a declaratory judgment under Section 2201. Accordingly, since the first cause of action set forth in Clinton H. Mitchell's complaint has become moot, the District Court properly denied his and the Clinton Mitchell Foundation's motion for summary judgment which was used as an instrumentality in an effort to obtain the prohibited declaratory judgment which was the obvious objective of Mitchell's second cause of action of his complaint.



## ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT CLINTON H. MITCHELL'S AND THE CLINTON MITCHELL FOUNDATION'S MOTION FOR SUMMARY JUDGMENT MUST BE DENIED SINCE THEY WERE SEEKING TO OBTAIN THROUGH THE INSTRUMENTALITY OF THAT MOTION A DECLARATORY JUDGMENT DETERMINING THAT THE FOUNDATION QUALIFIES AS A TAX-EXEMPT ORGANIZATION FOR FEDERAL TAX PURPOSES, A RESULT INTERDICTED BY SECTION 2201 OF 28 U.S.C.

In his complaint filed in the court below in this case, Clinton H. Mitchell sought, first, to recover the sum of \$10 and interest thereon, which sum he had voluntarily paid to the appellee Riddell "as partial payment on any tax for which you may hold us accountable" (I-R. 13) and, second, to obtain what amounts to a declaratory judgment decreeing that the Clinton Mitchell Foundation, which was created by him, qualifies as a tax-exempt organization for federal tax purposes. After the commencement of this action and a hearing on the Government's motion to dismiss the Government voluntarily repaid the sum of \$10 to Mitchell. A stipulation executed by the parties hereto subsequent to this repayment discloses that Mitchell admits that he has now received a refund of the \$10; that he has waived any statutory interest thereon; and that such payment and receipt will have no effect upon any subsequent determination concerning the tax-exempt status or lack of tax-exempt status of the Clinton Mitchell Foundation, if such subsequent determination in fact be made.

In its order of October 5, 1967, the court below allowed the Government's motion to dismiss. In so doing the court properly





pointed out (I-R. 60-61): "It is clear that this action should be dismissed for lack of jurisdiction in the Court over the subject matter of the action where, as here, there is no longer pending before the Court the right of plaintiffs to recover the Ten Dollars (\$10.00) heretofore voluntarily paid by plaintiffs to the Internal Revenue Service plus interest thereon. Plaintiffs have received such Ten Dollar sum and have waived interest thereon".

From the foregoing and from what we set forth below, it is clear that the District Court properly allowed the Government's motion to dismiss. It is obvious that the complaint's first cause of action became moot and is no longer in the case.

But aside from the original claim of Mitchell set forth in the first cause of action of his complaint seeking a refund of \$10, which claim as pointed out above has been satisfied by the voluntary payment of that sum to him by the Government, Mitchell in accordance with the purport of his second cause of action referred to above also seeks through the instrumentality of a pleading termed "Plaintiff's Motion for Summary Judgment and Mandate" what amounts to a declaratory judgment under Section 2201 of 28 U. S. C., supra, decreeing that the Clinton Mitchell Foundation qualifies as a tax-exempt organization for tax purposes. Section 2201 reads:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.



But it is clear from reading the above statute that the declaration with respect to federal taxes which Mr. Mitchell is seeking is expressly interdicted by its terms and that the District Court was correct in denying his and the Foundation's motion for summary judgment and dismissing, as noted above, the entire action on the ground that the court now had no jurisdiction of the subject matter of his suit. Moreover, it appears from the stipulation of the parties, and from the admissions of Mitchell in open court, that no assessment for federal income taxes has ever been levied against the Foundation. Therefore, even if Section 2201 permitted the entering of a declaratory judgment in some tax cases, which it clearly does not, at the present time, no "actual controversy" exists between the appellants and the Government as required for a declaratory judgment under Section 2201 of 28 U.S.C. Aralac, Inc. v. Hat Corp. of America, 166 F.2d 286 (C. A. 3d, 1948).

The issue in this case is almost identical to the one in Jolles Foundation v. Moysey, 250 F.2d 166 (C. A. 2d, 1957). In that case the Foundation brought action against the District Director of Internal Revenue for an order that the District Director had wrongfully excluded the plaintiff Foundation's name from the list of organizations entitled to the privilege of exemption from federal taxes. The District Court dismissed the complaint for lack of jurisdiction and the Foundation appealed. The Second Circuit stated (p. 169):

No tax has been assessed against the Foundation or even threatened. Thus there is no actual controversy between the Foundation and the District Director.

\* \* \*



\* \* \* the Foundation's action is "with respect to Federal taxes." In this field the courts have no jurisdiction to enter declaratory judgments. Taylor v. Allan, 10 Cir., 1953, 204 F.2d 485; Noland v. Westover, 9 Cir., 1949, 172 F.2d 614, certiorari denied 337 U.S. 938, 69 S. Ct. 1515, 93 L. Ed. 1744; Wilson v. Wilson, supra.

In addition to Noland v. Westover, 172 F.2d 614 (1949),

decided by this Court and cited by the Second Circuit in the above

quotation, see also two other decisions of this Court, namely,

Mayer v. Wright, 251 F.2d 178 (C. A. 9th, 1958), and Martin v.

Andrews, 238 F.2d 552 (C. A. 9th, 1956). Also in accord with the

Second Circuit's observation in the Jolles case, supra, are:

United States v. Teitelbaum, 342 F.2d 672 (C. A. 7th, 1965);

Sweeney v. United States, 285 F.2d 444 (Ct. Cl., 1961); England

v. United States, 261 F.2d 455 (C. A. 7th, 1958); Carmichael v.

United States, 245 F.2d 676 (C. A. 5th, 1957); Wilson v. Wilson,

141 F.2d 599 (C. A. 4th, 1944); Kyron Foundation, Inc. v. Dunlap,

110 F. Supp. 428 (C. A. D. C., 1952).

In reaching its conclusion that it was without jurisdiction

to enter a declaratory judgment with respect to the exempt status

for federal tax purposes of the Foundation involved in Jolles, supra,

the Second Circuit also noted that the policy behind Section 2201,

not allowing declaratory judgments with respect to federal tax

matters, is sound. The court stated (p. 169):

His [the Commissioner's] duty is to decide whether the particular activities submitted to him justify exemption. He cannot be foreclosed by declaratory judgment from reviewing the purposes and activities of applicants for exempt status when and as they are presented to him for decision. The Foundation's own case illustrates the situation. In 1947 the facts



warranted exemption; in 1952 a changed purpose brought termination. Its history and activities in 1954 did not produce any change of ruling but the Foundation may still avail itself of the right to show any change of activities and again seek exemption. A declaratory judgment upon the facts here set forth would serve no purpose. (Emphasis supplied.)

In the instant case, taxpayers' appeal is entirely based upon their contention that Section 2201 of 28 U.S.C., and Sections 7422(f)(1) and 7423 of the Internal Revenue Code of 1954, supra, are unconstitutional. A declaratory judgment, authorized by Section 2201 of 28 U.S.C., is not a constitutional right as taxpayers indicate, but a procedural remedy created by statute. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937); Aralac, Inc. v. Hat Corp. of America, 166 F.2d 286 (C. A. 3d, 1948). In England v. United States, 164 F. Supp. 322 (E.D. Ill., 1958), affirmed, 261 F.2d 455 (C. A. 7th, 1958), the court stated (p. 323):

Declaratory judgments are a creature of statute and, therefore, may be pursued only in accordance with the provisions of that statute. Section 2201, Chapter 28 U.S.C.A., makes provision for declaratory judgments.

The court further stated (p. 324):

The plaintiffs have no standing to proceed under the declaratory judgment act since that act specifically excludes controversies concerning federal taxes and it is upon a claim concerning federal taxes that this complaint is based.

In Jolles, supra, the Foundation there involved strenuously made for all intents and purposes the same argument that the appellants are making here with respect to the constitutionality of Section 2201. In rejecting this contention the Second Circuit said (pp. 169-170):





The Foundation has been deprived of no constitutional rights despite its elaborate arguments to the contrary. If a tax is assessed both the Foundation and prospective donors are afforded appropriate procedural remedies to test the exempt nature of the organization upon the facts as they then may exist.

The taxpayers in this case are not being denied judicial review as they assert. (Br. 5-6.) Sections 7422(f)(1) and 7423 of the 1954 Code in no way deprive a taxpayer of any redress he may have for any alleged wrong to him; they simply state that his suit shall be against the United States rather than the officer, employee, or personal representative of the United States who personally administered the law. As the Court pointed out in Jolles Foundation v. Moysey, supra (p. 170), if a tax is assessed against the Foundation, appropriate procedural remedies are available to test the exempt nature of the organization upon the facts as they existed at the time the tax accrued. In an analogous situation the Supreme Court long ago pointed out (Snyder v. Marks, 109 U.S. 189 (1883)):

The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law. \* \* \* In Cheatham v. United States, 92 U.S. 85, 88, and again in State Railroad Tax Cases, 92 U.S. 575, 613, it was said by this court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would



subject itself to the judgment of the courts in the collection of its revenues.

And again more recently in United States v. Sherwood, 312 U.S. 584, 586 (1941), the Court observed:

The United States, as sovereign, is immune from suit save as it consents to be sued, United States v. Thompson, 98 U.S. 486; United States v. Lee, 106 U.S. 196; Kansas v. United States, 204 U.S. 331; Minnesota v. United States, 305 U.S. 382; Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 388; United States v. Shaw, 309 U.S. 495 (see cases cited in The Pesaro, 277 F. 473, 474, *et seq.*), and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.

The procedures applicable currently are explicitly set forth in Internal Revenue Service Publication No. 183 (formerly Form 1717), revised September, 1954, p. 36,022:

#### Appellate Rights

The Internal Revenue Service does not have the final word as to whether an organization is exempt under section 501 of the Internal Revenue Code of 1954 and corresponding provisions of prior revenue laws. Where the Service denies exemption under section 501 of the Code and asserts that a tax is owing, its determination may be appealed to one of several courts. The appeal may be taken either by the organization which is ruled taxable, rather than exempt, or by a person who asserts his right to deduct contributions made. In either event, appeal to the courts may be made by either of the following procedures: The organization, or a person who has made a contribution to an organization claiming to be exempt under section 501(c)(3), may pay the disputed tax liability and then bring an appropriate suit for refund in a United States District Court or in the United States Court of Claims. On the other hand, the organization, or person who has made the contribution, has the right under existing law to appeal a proposed income tax deficiency prior to paying the tax, in which case an appeal is taken to the Tax Court of the United States. In the event of such a proposed deficiency (or proposed disallowance of a claim for refund), the taxpayer has the usual



rights of informal and formal conferences in the field offices of the Internal Revenue Service. An adverse decision rendered by a District Court, the Court of Claims, or the Tax Court may be appealed to a higher court in such cases as in other tax controversies.

It is obvious that if the Internal Revenue Service should undertake to assert an income tax against the Foundation herein on the basis it is not tax exempt and if the Foundation follows the procedure outlined above, then every possible right accruing to its benefit will be amply protected.

#### CONCLUSION

For the reasons stated above, the orders of the District Court were correct and should be affirmed.

Respectfully submitted,

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February, 1968.



## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 19th day of February, 1968.

/s/ Jerry R. Stern  
Asst. U. S. Attorney

